

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



*Orig w/ affidavit of mailing 13*  
**75-1147** *PLS*

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 75-1147**

UNITED STATES OF AMERICA,

*Appellant,*

*—against—*

ALFRED FAYER,

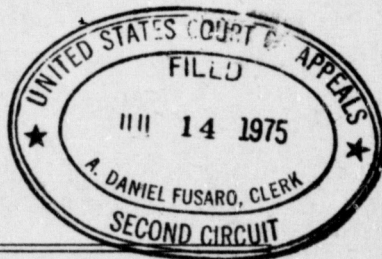
*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR THE APPELLANT**

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 75-1147

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UNITED STATES OF AMERICA,

*Appellant,*

—against—

ALFRED FAYER,

*Defendant-Appellee.*

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### REPLY BRIEF FOR THE APPELLANT

This reply brief will not attempt to restate the extensive treatment of the facts and the law contained in our main brief. It is submitted that that brief established that the judgment of acquittal on the obstruction of justice charge is appealable, and that appellant corruptly endeavored to influence a witness within the meaning of 18 U.S.C. § 1503. We will here address ourselves to the specific contentions on these issues made in appellee's brief.

### ARGUMENT

#### POINT I

**The judgment of acquittal on the obstruction of justice charge is appealable.\***

(1)

Appellee claims that under the principles of *United States v. Wilson*, — U.S. —, 95 S. Ct. 1013 (1975) and *United States v. Jenkins*, — U.S. —, 95 S. Ct. 1006 (1975),

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\* In reply to Point One of appellee's brief.

the issue of appealability turns on whether or not the district court made a finding of guilt, in form or substance, such that if this Court made a determination on the merits of the appeal favorable to the United States it could reverse and remand the matter with instructions to reinstate the finding of guilt. Appellee contends that the judgment appealed from specifically finds Fayer not guilty, that there was no finding or verdict of guilty below, and hence there is no right to appeal.\*

This argument is without substance. Indeed, if appellee is correct, there could never be an appeal by the United States where the district court enters a judgment of acquittal after a non-jury trial. Yet in *United States v. Jenkins*, *supra*, 95 S. Ct. at 1011-1012, the Supreme Court clearly indicated that where the district "court's finding of 'not guilty' is attributable to an erroneous conception of the law whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard", the judgment of acquittal is appealable by the United States. In such a case, *Jenkins* indicated, a remand to the district court for the entry of a judgment of conviction which simply involves the application of a correct legal standard to the facts already found does not violate the Double Jeopardy

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\* Appellee's reliance on various cases involving pre-trial dismissals in which the Court considered facts not in the indictment is misplaced. *Serfass v. United States*, — U.S. —, 95 S. Ct. 1055 (1975) has overruled that line of cases. Indeed, in *United States v. Lewis*, 492 F.2d 126 (5th Cir. 1974), relied on by appellee, the Supreme Court (— U.S. —, 95 S. Ct. 1671 (1975)) vacated the judgment and remanded the case for further consideration in light of the *Serfass* decision. Moreover, appellee's claim that Section 3731 does not under any circumstances authorize an appeal from an "acquittal" is frivolous. See *United States v. De Garces*, — F.2d — (2d Cir. June 13, 1975, slip op. 4009, 4014-4016), which held that the United States may appeal from a judgment of acquittal by the district court on the ground of insufficiency of the evidence entered after a verdict of guilty by the jury.

Clause. It is only when new evidence must be heard, or new findings of fact made, if the United States is successful on appeal that the Double Jeopardy Clause bars the appeal. As we have shown in our main brief, that is not this case.

(2)

Appellee cites *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972) for the proposition that a specific intent to obstruct justice must be found. Appellee then contends that a "verdict of guilty could not have been found by the trial judge in the absence of a finding that Fayer's desire to help the Bernsteins was coupled with the specific intent to obstruct justice as to them by giving advice to Goodwin," and that the district court made no such finding (brief, p. 13). With this as a premise, appellee concludes that under *Jenkins* the judgment of acquittal is not appealable.

In our main brief we have demonstrated that under the factual findings of the district court appellee acted corruptly (that is, with a bad, evil or improper motive or purpose) within the meaning of the obstruction of justice statute. In this context it would seem that where a defendant has been found to have endeavored to influence a witness not to go voluntarily before the grand jury, with the motive of protecting targets of the grand jury investigation, a claim that he has not been found to have acted with the specific intent to obstruct justice raises merely a matter of semantics.

In *United States v. Ryan*, *supra*, relied on by appellee, the district court had instructed the jury that endeavoring to obstruct grand jury functions was within the purview of Section 1503, and the jury convicted the defendant. However, the evidence failed to establish that the defendant had knowledge at the time the records were destroyed that a grand jury investigation was contemplated, or even

that the acts complained of bore a reasonable relationship to the subject of the grand jury investigation. Accordingly, after referring to the meaning of corruptly and specific intent under Section 1503, the Court of Appeals held that intent had not been established beyond a reasonable doubt (455 F.2d at 734).

In the case at bar appellee raised at trial an analogous contention with respect to his intent.\* Although there was no dispute, and the district court found, that Fayer was aware of the grand jury proceeding, the defense did contend that Fayer thought Goodwin was a possible defendant, not a witness, and that Fayer's advice to Goodwin was intended to relate only to the latter's talking with the F.B.I., not to his testifying before the grand jury. As discussed in our main brief (pp. 19-20), the district court resolved these factual issues as to Fayer's knowledge and intent against appellee. Indeed, the district court found that Fayer *intended* to advise and *understood* that he was advising Goodwin not to testify voluntarily before the grand jury, and that this (Goodwin testifying voluntarily before the grand jury) was the *great danger* Fayer and the others were concerned with (A. 340).

Putting aside for the moment the dual motive issue discussed in our main brief, if there is any lingering doubt that the district court resolved against Fayer all of the factual issues as to his state of mind necessary to support a finding of guilt, it is removed by the district court's

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\* Although in this context it is probably only semantics, it might be noted in passing that appellee was charged under the endeavoring to influence a witness part of Section 1503, not the endeavoring to influence the due administration of justice part. Accordingly, the requisite specific intent is to influence a witness in connection with a grand jury proceeding, not necessarily to directly influence the proceeding itself. See *United States v. Abrahms*, 427 F.2d 86, 90 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

findings concerning motive. The district court found beyond a reasonable doubt that one of his motives, clearly, was to protect the Bernsteins; however, the district court stated, Fayer *may also* have wanted to help Goodwin by giving him legal advice (A. 359-361). The district court stated that "if the whole thing were set up to protect the Bernsteins rather than Goodwin, I would have found him guilty" (A. 361). Thus, as noted in our main brief (pp. 21-24), the only bar in the district court's conception of the facts and the law to a finding of guilt was its view that in order to convict it must find beyond a reasonable doubt that Fayer's *only* motive was to protect the Bernsteins. Appellee having been found to have endeavored to influence Goodwin not to go voluntarily before the grand jury with the intent of so advising him and with the motive of protecting the Bernsteins (albeit perhaps not the sole motive), under the correct legal standard set forth in our main brief clearly the district court's findings relative to appellee's state of mind expressly, or at the very least impliedly (see *United States v. Jenkins*, *supra*, 95 S. Ct. at 1011-1012), resolved against appellee all of the factual issues as to his state of mind necessary to support a finding of guilt.

## POINT II

**The conduct of appellee constituted a corrupt endeavor to influence a witness within the meaning of the statute.\***

Appellee appears to view the evidence and findings of the district court as establishing that at a time when he was the attorney for Eastern Service Corporation, he merely met with Goodwin and the Bernsteins, discussed with Goodwin a matter of mutual importance to Goodwin and the Bernsteins, and advised Goodwin only to obtain adequate

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\* In reply to Point II of appellee's brief.

counsel and to follow counsel's advice as to whether or not to take the Fifth Amendment. Citing *McNeal v. Hollowell*, 481 F.2d 1145 (5th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) in support, appellee contends that these actions were proper and do not constitute a corrupt endeavor to influence a witness within the meaning of 18 U.S.C. § 1503.\*

We may assume that such actions do not constitute a corrupt endeavor to influence a witness within the meaning of the statute, and that an attorney representing a target of a grand jury investigation may upon request of a grand jury witness advise that witness of his rights with respect to testifying before the grand jury without violating the statute. See *Cole v. United States*, 329 F.2d 437, 439 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964) (Section 1503 does not proscribe acts consistent with the due administration of justice, such as influencing a witness to tell the truth).\*\* However, Fayer herein did not merely warn Goodwin that

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\* Appellee mischaracterizes the contention of the United States in this regard as being "that a lawyer's giving advice to one who seeks it from him results in acting corruptly, because that advice tends to help another client and, consequently, may possibly impede the Government in its investigation of the other client" (brief, p. 14). First of all, insofar as the reference to "another" client or "other" client implies that Goodwin was Fayer's client, we made clear in our main brief (pp. 33-37) that there was no attorney-client relationship between Fayer and Goodwin, and no reasonable belief on Fayer's part that there was such a relationship between them. Secondly, the basis of our contention that appellee acted corruptly lies in his actual *motivation*, to protect the Bernsteins as found by the district court, not just in the fact that his advice to Goodwin tends to help the Bernsteins.

\*\* Cf. ABA Informal Decision No. C-498 (1962) (defense counsel in a criminal proceeding may properly admonish a witness for the prosecution that his testimony may tend to incriminate him); ABA Informal Decision No. 575 (1962) (defense counsel in a criminal proceeding may warn a witness for the prosecution that his testimony may tend to incriminate him and that he need not testify, even where the counsel's motivation is to encourage or persuade the witness not to testify against the accused).

his testimony may tend to incriminate him and advise him that he had a right to invoke the Fifth Amendment. Nor did Fayer merely advise Goodwin that he was under no duty to appear voluntarily before the grand jury. Rather, as the district court found beyond a reasonable doubt, Fayer endeavored to influence Goodwin not to go voluntarily before the grand jury (A. 340, 341, 347, 351, 358, 359). Thus Fayer crossed the line between the permissible conduct of advising the witness of his rights in this regard, and the criminal conduct in violation of the statute of advising and attempting to persuade the witness to take a particular course of action, that is, not to testify voluntarily before the grand jury. See *Cole v. United States*, *supra*, 329 F.2d at 442, 443 (unlawful action in insisting, imploring, or demanding, or in advising, that witness take the Fifth); *United States v. Grunewald*, 233 F.2d 556, 570-571 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391, 424 (1957).\*\* See also the discussion in fn. 2 on p. 20 of our main brief.

These cases (*Cole* and *Grunewald*) and *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974) make it clear respectively that a target of a grand jury investigation and an associate of such a target violate the statute in advising a grand jury witness to

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\*In that case an attorney who was himself a target of the grand jury investigation endeavored to influence various witnesses to remain silent, not talk, and stand on their constitutional rights in connection with the grand jury investigation. This Court held that it was immaterial that the attorney did not ask the witnesses to tell deliberate falsehoods. Moreover, it noted that "it is nothing short of fantastic to suggest that this is no more than legitimate advice by a lawyer to a client, for the client's own protection" (233 F.2d at 571). The Supreme Court reversed the conviction on other grounds. However it held that the evidence was "quite sufficient" to support the conviction, and found "no substance" to the attorney's contention "that he was in effect convicted for advising, as a lawyer, some of the witnesses before the grand jury that they had a right to plead their Fifth Amendment privilege" (353 U.S. at 424).

remain silent in connection with a grand jury proceeding, with the motive of protecting the target. This is exactly what the district court found Fayer did here. There is no reason, and appellee offers none, why an attorney for a target of a grand jury investigation should be able to endeavor to influence a witness in order to protect his client in a manner which the client or an associate of the client may not.\*

*McNeal v. Hollowell*, *supra*, relied upon by appellee, is inapposite. In that case the Court stated that it saw no impropriety in the following conduct of the attorney Ross, and considered it to be the legitimate action of a defense counsel (481 F.2d at 1152):

... in the course of preparing for the trial of his client, Ross contacted the key witness Banks and his attorney Kellum, apparently impressed on Kellum the danger of Banks' testifying while still under indictment for the same offense, and reminded him of the protection afforded by the Fifth Amendment. . . .

According to the prosecutor's later testimony, this meeting with Banks at the trial was the first opportunity Ross had had to discuss the case with him. Additionally, it is not suggested that Ross prevailed directly on Banks at this time. Rather it is agreed that at all times Banks' counsel Kellum was exer-

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\* Cf. ABA Standards Relating to the Prosecution Function and the Defense Function: The Defense Function, § 4.3(c) (1971) (see the language of the provision at Supp. p. 16 and the commentary at p. 230, indicating that a lawyer should not *discourage* or obstruct communication between witnesses and the prosecution); Code of Professional Responsibility, DR 7-104(A)(2) (a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client).

cising his own discretion and that he personally made the final decision to have Banks plead the Fifth Amendment.

Although in its discussion of this matter the Court did refer to the obstruction of justice statute, 18 U.S.C. § 1503, and *Cole v. United States*, *supra*, the issue before the Court was not whether or not there had been a violation of that statute; rather the issue was whether or not the defense counsel's action was tantamount to a solicitation of a mistrial, such that there was a manifest necessity for the declaration of a mistrial by the trial court. More importantly, to the extent that the attorney went beyond the giving of advice concerning the witness' rights and advised a particular course of action in connection with the witness' testimony, the Court made it clear that the attorney did not prevail directly on the witness but rather on the witness' attorney in this regard. In the case at bar Fayer endeavored to prevail directly on the witness Goodwin; Goodwin's attorney was not present.\*

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\* Accordingly, it need not be decided whether the *McNeal* case (a 2-1 decision by the Fifth Circuit) correctly resolved the matter of the attorney's conduct. It might be noted in this regard that the majority opinion did refer to the principle of the *Cole* case that one may not bribe, coerce, force, or threaten a witness to claim the privilege against self-incrimination, but significantly omitted any mention of the principle from the same case that one also may not with a corrupt motive advise a witness to claim the privilege against self-incrimination. In *Cioffi* this Court clearly adopted the principle which the *McNeal* case failed to mention.

## CONCLUSION

The judgment of acquittal should be reversed and the case remanded with a direction to enter a judgment of conviction.

Respectfully submitted,

July 14, 1975

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## AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 14th  
day of JULY, 1975, I deposited in Mail Chute Drop for mailing in the  
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and  
State of New York, a Appellant's Reply Brief  
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper  
directed to the person hereinafter named, at the place and address stated below:

Jack Korshin, Esq.  
370 East Old Country Road  
Mineola, N.Y. 11501

Sworn to before me this  
14th day of July, 1975

*Olga S. Morgan*  
OLGA S. MORGAN  
Notary Public, State of New York  
No. 240501986  
Qualified in Kings County  
Commission Expires March 30, 1977

*Evelyn Cohen*